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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 564

SAMUEL HAROLD LITTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 402-413) is reported at 177 F. 2d 416.

JURISDICTION

The judgment of the Court of Appeals was entered on November 3, 1949 (R. 414), and a petition

for rehearing was denied on December 5, 1949 (R. 420). Upon timely application therefor, petitioner's time for filing a petition for a writ of certiorari was extended by order of Mr. Chief Justice Vinson to February 1, 1950, and the petition was filed on January 28, 1950. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F.R. Crim. P.

QUESTION PRESENTED

Whether the trial court erred in admitting petitioner's confession in evidence.

STATEMENT

A six-count indictment filed on October 20, 1947, in the District Court for the Eastern District of Arkansas, charged that on December 3 and 12, 1946, and February 22, 1947, petitioner, a resident of North Little Rock, Arkansas (R. 33, 222), and one Lewis Harrison Buis broke the seals on box cars moving in interstate commerce with intent to commit larceny (counts 1, 3 and 5) and stole cigarettes from the cars (counts 2, 4 and 6), in violation of 18 U.S.C. (1940 ed.) 409 (R. 1-7).

On April 7, 1948, when the case was called for arraignment and plea, the court, at the instance of both parties, held a hearing in chambers on petitioner's anticipated objection to the admissibility of a confession he had made on the ground that it was involuntary (R. 111-113). At this hearing and

at the trial [1] the following uncontradicted evidence was adduced:

It was stipulated that the box cars described in the indictment contained cigarettes which were moving in interstate commerce and on the dates of the commission of the alleged thefts passed through Brinkley, Arkansas, and that subsequently, when the cars arrived at their destination, each shipment was short in the same number of cases as were alleged to have been stolen (R. 8-11, 23-24). Special railroad investigators who worked in and around Brinkley testified that on or about the dates mentioned in the indictment, they found the seals on the cars broken and cigarettes missing therefrom (R. 26-29, 58, 63, 70-72, 76-77).[2]

About 12:30 a.m. on February 25, 1947, railroad investigator E. N. Frizzell, who had been investigating the December 1946 box car robberies charged in the indictment, found petitioner alongside a train in the railroad yard at Brinkley, 70 or 80 miles from North Little Rock. He was carrying a flash light and tools which could be used for breaking box car seals. When Frizzell asked him what he was doing, petitioner first said that he was going to Wabbaseka, Arkansas, but later gave his destination as

[1] Petitioner is wrong in his assertion (Br. 4) that the evidence adduced at the hearing in chambers was not repeated at the trial. With the exception of some evidence introduced by petitioner at the hearing, all the witnesses repeated their testimony at the trial.

[2] Seals which can be used only once are applied to box cars so that they cannot be opened without breaking them (Gov. Ex. 2, R. 60-61).

Stuttgart. When questioned as to why he did not take a passenger train or a bus, he said, contrary to actual fact, that there were no trains or busses going to Stuttgart.[3] Frizzell then took petitioner to the Brinkley city police, who placed him in jail. Upon further questioning by Frizzell and the police, petitioner said, "maybe I was down there robbing your train." (Gov. Ex. 1, R. 25-33, 36-39, 43, 45, 52, 53, 54, 55, 62, 87, 139, 141, 145, 205, 206-207.) On February 25, he was charged in the city court with vagrancy and trespassing (R. 87, 97, 144, 145), tried, convicted, and sentenced to imprisonment for 11 months and 15 days (R. 34, 88, 123, 145, 149, 150, 216, 377-379; Def. Ex. R. 379). On February 26, while in the custody of the Brinkley police under this sentence, he denied the thefts at intermittent interrogations by the local police and F.B.I. agents who were investigating the thefts and had been notified of petitioner's arrest and the suspicions of the local police. Later on February 26, after the F.B.I. agents had left, petitioner orally confessed the thefts to Henderson, the chief of the Brinkley police. The F.B.I. was notified of this confession and on February 27, in the presence of two agents and a railroad investigator, it was reduced to writing, as follows (R. 33, 35-36, 47, 103-104, 113-122, 124-126, 128-131, 137, 140, 212, 243, 253-256; Gov. Ex. 4, R. 247-252):

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[3] Later, at the Brinkley jail he told the local police that he wanted to go by freight to save the 30-cent fare (R. 87).

I, SAMUEL HAROLD LITTON, make the following statement to Albert E. Townsend, Jr., who I know to be a Special Agent of the Federal Bureau of Investigation. I make this statement voluntarily and nor force or threats were used to get me to make this statement. I know that I do not have to make a statement and in making this statement I realize that it can be used in a court of law against me.

I am 44 years of age and reside at 508 East Broadway, Rose City, North Little Rock, Arkansas. I am married and reside at this address with my wife Bessie Pauline Litton. During the last few months I have been working at the Dixie Lumber Company in North Little Rock, Arkansas. I have know [sic] LEWIS HARRISON BUIS for about five or six months. During the past few months I have seen quite a bit of Buis and he helped me put a back spring in my 1937 Plymouth at my home. In December 1946 Buis and I came to Brinkley, Arkansas and looked around to see what the set up was and what arrangements could be made for a future visit in the railroad yards. About two or three nights after this we came down to Brinkley, Arkansas and parked the truck on a dirt road near the Cotton belt tracks where the switching is done. We got here before the train arrived from Memphis, which train was a Cotton Belt train and arrives in Brinkley before Midnight. We were sitting in the truck on the road near the tracks. When the train arrived in the yards the engine cut off and went off to the main line with the crew and left the cars sitting here unattended. I slipped

up the field to the track and walked down the train until I came to a car of cigarettes.

I felt that the car I located was a cigarette car since it had a nail in the hasp. I pulled the nail and broke the seal and opened the door of the car. In this car were Camel cigarettes, so I took several cases out and I believe there were around 12 cases. I laid these by the ditch and then after unloading the cases I wanted, I carried them across a field near an old mill yard where I stacked them. I then returned to the truck where Lewis was waiting for me, and we sat there until the cut of cars had been pulled back on the main line and taken out of Brinkley. During this time we noticed an individual pass the truck and go into the mill yard. After waiting a while we backed the truck into the mill yard and began loading the cigarettes in the truck. When I had just about finished loading the truck someone shot at us and I ran and jumped in the truck and Lewis drove away. We drove from Brinkley to North Little Rock and Lewis stopped the truck about a block from my house. I got out of the truck and walked home and Lewis drove on off in the truck with the cigarettes.

Two or three days after this I was at the Dixie Lumber Co. and Lewis came over and after talking to a few of the fellows slipped me a $100.00. We didn't do anything during the holidays and the next time I saw him was when I helped him put a new motor in his 1938 Ford Truck. This is the same truck that we made all of the trips to Brinkley in and it is the truck found near the Cotton Belt Yards when

I was arrested. I can identify this truck as a 1938 Panel truck, with rear view mirror and government shields on the side. These shields indicated to me that this truck at one time belonged to the U. S. Government.

We made arrangements to come to Brinkley again and see if we could get some cigarettes and on Friday February 21, 1947 I met Lewis in front of my house after dark. We drove to Brinkley, Arkansas and drove further on down the road we were on before and parked the truck and I walked across the field to the Rock Island Tracks. I didn't go across the field until after the train came into the yard, I walked along the train and found a car that I though [sic] was cigarettes. I pulled the nail and cut the seal when the train pulled out and went from Brinkley to Carlisle, Arkansas. I got in the truck and we rode to Carlisle and while the train was sitting here I threw out 8 cases of Kool cigarettes. I carried the cigarettes across a little field and Lewis helped me load them in the truck. Lewis had been waiting in the truck for me to come up with the cigarettes. We drove to North Little Rock and I got out of the truck on the corner of Oak and Broadway. Lewis gave me a $100.00 at this time and he left with the truck and the entire load of cigarettes.

On Monday night February 24, 1947 I called Lewis and we decided to come to Brinkley agin [sic] for some more cigarettes. Lewis came by for me about 7:30 PM in his truck and we drove to Brinkley, Arkansas. We drove on out 70 highway toward Memphis, Tennessee.

We waited here on the side of the road until we saw the Rock Island train coming, and we let it pull in the yard ahead of us. The engine cut off of the train and went up toward the depot. I got out of the truck and walked over to a button factory and watched a car inspector walk down the train. Lewis drove back toward town along the Rock Island track and parked the truck. When the Cotton Belt train pulled in I went on down the road. Lewis was watching me and was going to drive the truck on down near where I was when the train stopped. I came on the track at the crossing and walked along the train and ran into Mr. E. M. Frizzell, Special Agent for the Cotton Belt Railroad. Mr. Frizzell then brought me on to the Brinkley Police Department.

In addition to the above I recall another time I was over here which was actually the first boxcar robbery I participated in. The first and second visits were so close that I was confusing the second visit with the first. The first visit was around December 8, 1946 when I came to Brinkley with Lewis. He stopped by my house and picked me up and we drove directly over to Brinkley, Arkansas. We parked the truck in Negro town this night which is across the tracks. We sat in the truck until the Cotton Belt train came in, and I got out and went over among the cars after the engine cut off and went down by the coal chute. I walked along the train until I came to a car I though [sic] was cigarettes due to the nail in the hasp. I pulled the nail and broke the

seal. I opened the doors and found the car loaded with Camel cigarettes. I unloaded eight cases and I carried them across a ditch and up toward a fence setting on the old mill yard. Lewis got the truck and came down a dirt road by the compress, and I threw most of the cigarettes in the truck. Lewis helped me, but I believe that he only loaded one or two cases. We drove back to North Little Rock and I got out in front of my house. He didn't give me any cigarettes or money. A few days he came by the lumber shed and gave me a $100.00. This took place at the Dixie Lumber Company, North Little Rock, Ark.

On the night that I was arrested I didn't know what had happened to Lewis, but I figured he got in his truck and went back to Little Rock.

On each occasion that I broke in the boxcars I threw the seal and nail away near the area where the theft took place.

I have read the above statement consisting of four and a portion pages and it is true and correct. I have initialed each page to show that I have read it.

(S.) S. H. Litton,
Feb. 27th, 1947.

On February 28, 1947, petitioner was given a preliminary hearing on state burglary and grand larceny charges (Def. Ex. 4, R. 379), and on March 1, 1947, he was transferred to the Monroe County jail. A few days later, after retaining an attorney, he, for the first time since his incarceration, as-

ser. 1 to the F.B.I. agents that his confession was the result of beatings and coercion by the local police. Also, his brother, who visited him about the same time, told the county sheriff that petitioner was badly bruised and needed a doctor. The sheriff called a doctor who examined petitioner.[4] (R. 117, 123, 126, 132, 135, 137, 147, 196, 197, 198, 238, 240-241, 259-260, 267, 268, 283-284.) A complaint charging the offenses for which he was later indicted was filed on March 1, 1947 (R. 265, 274), and petitioner was arraigned on this complaint before a United States Commissioner on or about March 10, 1947 (R. 123-124, 265-266).

There was conflicting evidence as to the circumstances in which the confession was made. The Government adduced the following evidence:

Chief of Police Henderson testified that during the evening of February 26, 1947, the day after petitioner was convicted and sentenced in the city court, he visited the jail on another matter. While he was there petitioner asked him, " 'If I go ahead and tell the truth about this will I have to do these eleven months?' I said, 'I don't imagine you will, Harold.' He said, 'Well, I just want to get it off my chest and go ahead and tell the truth.' He said, 'I want to ask it another way.' I said, 'I don't know; what is it' and he said, 'I want to be tried in State court instead of Federal court.' I said, 'I can't promise you that,' and I asked him 'Why?'

[4] The doctor died prior to the hearing and trial (R. 238).

He said his mother was getting old and while he was doing his time she was liable to pass away, and if she did the State officers would let him go to the funeral but the Government wouldn't." Thereupon, without any questioning by Henderson, petitioner confessed voluntarily and without any coercion that he committed the thefts. (R. 89, 145-146.) Later that night F.B.I. agent Townsend advised Henderson that the F.B.I. had apprehended Buis, and Henderson advised Townsend of petitioner's oral confession to him. When Henderson told petitioner of Buis' arrest, petitioner replied, "You have got your man." On the afternoon of February 27, Townsend, in the presence of another F.B.I. agent and a railroad investigator, took down petitioner's confession, quoted above, which was given voluntarily and without any coercion, duress or promises of any kind after Townsend advised petitioner of its incriminating nature and that he did not have to make a statement.[5] (R. 82-83, 88-94, 103-106, 109, 115-117, 120-122, 127-128, 129, 131, 134, 137, 140-143, 145-149, 150-152, 253-259, 284, 285.)

The Government's witnesses included the two F.B.I. agents and the railroad investigator present when petitioner signed the confession, another railroad investigator who was present when the Brinkley police questioned petitioner, Chief of Police

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[5] Townsend and his colleague testified that they would not have taken the confession had they thought that it was not voluntary (R. 133, 261).

Henderson, the Brinkley mayor who tried petitioner on February 25 and arraigned him on the state charges on February 28, two persons who were present at the proceedings on those dates, and the Monroe County sheriff who transferred petitioner to the county jail and who was also present at those proceedings as well as later at the county jail when a doctor stripped petitioner and examined him. Each of these witnesses saw petitioner on one occasion or another between February 25 and March 10, 1947, and each testified consistently and unequivocally that to their personal knowledge petitioner had at no time been beaten or abused in any manner by the Brinkley police or the F.B.I., and that his physical appearance during that period bore no evidence of any mistreatment of any kind, except for a skinned spot on his right hand, which petitioner told Townsend he had injured in the railroad yard. (R. 47, 83, 91, 98, 104-106, 109, 117, 131-133, 138, 140, 146-149, 239, 241, 263-264, 268, 271-272, 283-285, 288-289, 293, 306-307.) Petitioner's photographs taken by the F.B.I. on February 26, 1947, for identification purposes show no sign of any physical abuse (Gov. Ex. 3, R. 107-108). Frizzell, the special railroad investigator, also testified that petitioner did not want a lawyer because, as he said to his wife in the presence of others when she visited him at the city jail in Brinkley, "there's no use you spending any money on me because Judge Waggoner would throw the book at me", and that she should use the money to

increase the insurance on their house to protect them if Buis should burn it (R. 35).

Petitioner testified, on the other hand, that his confession was induced, not to avoid serving the local sentence, but "only" by severe and constant beatings and kickings by Henderson and other local police which resulted in injury to his hand and head, that he was denied food and water until he confessed, that he was not allowed to have a lawyer or see his wife or relatives, and that he was afraid to make any complaints to anyone, including his wife, until he was transferred to the county jail.[6] He admitted that while he was in the Brinkley jail he asked his wife not to retain counsel for him, but he said he made this request of her only because he was afraid of the local police. (R. 207-219.) Petitioner's wife testified that she first saw him at the Brinkley jail after he had confessed, that he was bloody and badly beaten, but did not complain to her, and that she later brought him a change of clothes and took the others home because the shirt, although not bloody, was torn from the beatings and the coveralls were smeared with blood. The coveralls were admitted in evidence but Mrs. Litton had burned the shirt. Despite petitioner's appearance, Mrs. Litton did not do anything about it until a few days later when she complained to Townsend, after petitioner had been transferred to the county

[6] Petitioner testified only at the hearing on the admissibility of his confession, where he admitted several previous convictions for burglary and grand larcency (R. 219-221).

jail. She denied that her husband had asked her not to retain a lawyer for him. (R. 192-200; Def. Ex. 1, R. 195.) Two of petitioner's relatives testified that they saw him at the county jail and that the back of his head was badly bruised (R. 189-192, 203-204, 310-318). Three of petitioner's fellow inmates at the Brinkley city jail and one from the county jail testified that he appeared badly bruised and bloody. One of these witnesses testified that petitioner's head was injured in the back, while two others said it was injured in the front. One of them, Moman, testified that he was in the Brinkley city jail with petitioner for a period which he at first described as a week and the duration of which he later professed inability to recall, that while he was confined there he cooked for the prisoners, and that he was instructed by the person in charge of prison cooks, who in rebuttal denied this, not to give petitioner any food or water. Another of these witnesses, Hoke, testified that through a crack in the door he saw an officer, whom he thought was Henderson because of the color of his trousers, beat petitioner, and that petitioner's shirt and coveralls were bloody. (R. 162-170, 176-183, 234-236, 319-336, 338-349.)

In rebuttal, the Government showed that Moman was given 30 days on January 27, 1947, served the full time, which expired on February 26, the day after the petitioner entered, and so could not have been in the jail with the petitioner for much more than one day (R. 232-234).

At the conclusion of the hearing on the admissibility of petitioner's confession (see p. 2, *supra*), the trial court ruled that it was freely and voluntarily made and should therefore go to the jury under appropriate instructions (R. 245). When the confession was admitted at the trial, the court stated (R. 277-278):

> I now desire to give the jury certain instructions in connection with some evidence that has been introduced here. Members of the jury, the Court has permitted to be introduced in this case certain evidence, written and oral, of a confession alleged to have been made by the defendant Litton. You are instructed that this has been done in connection with an instruction which the court will now give you:
>
> You, the jury, will in the end and finally, in connection with this alleged confession, determine, first, whether the defendant actually made said statements, oral and written, and if he made them, whether they were made by him voluntarily and of his own free will, and you will also determine whether said alleged confession is free from the taint of official inducement proceeding either from hope inspired by assurance and made to the defendant, or fear of what might befall him if the confession was not made. You are also instructed that you are the judges as to what weight, if any, should be accorded said alleged written and oral statements of the defendant.
>
> You are further instructed that any confession or admission obtained from this defendant cannot be used against him and should

be totally disregarded by you, unless you find that it was voluntarily made without threat, coercion, or physical force having been used upon him, and also unless you find that it was not induced by any promise or assurance made by the Chief of Police of the city of Brinkley.

Any confession that might be fairly traceable to the hope inspired by statements of this official, would not be binding on the defendant. Such a confession, as has been stated by one court, "must be free from the taint of official inducement, proceeding either from the flattery of hope or the torture of fear."

I will instruct you further in this connection at the conclusion of the trial, but I am giving you these instructions at this time so that you may have them in your minds at approximately the time that the alleged statements of the defendant were admitted in evidence, and so that you may consider these instructions along with that evidence, and take these instructions into consideration when you weigh that evidence.

In his final charge, the trial judge gave these further instructions (R. 391-394):

Now, members of the jury, I will instruct you on one of the most crucial features of this case, namely, on the alleged confession which the Government contends was made by the defendant in this case. You will recall that at about the time said alleged confession was introduced in evidence, the court gave you certain instructions with reference to the admissibility thereof. These instructions will

in effect be given you again, as well as additional instructions in this regard:

As I have previously told you, it is your duty, with respect to the alleged confession, to determine, first, whether the defendant actually made the alleged statements oral and written, as contended by the Government, and if he made them, whether they were made by him voluntarily and of his own free will; and you will also determine whether said alleged confession is free from official inducement proceeding either from hope inspired by statements made to the defendant, or fear of what might befall him if the confession was not made. You are instructed also that you are the judges as to what weight, if any, should be accorded said alleged written and oral statements of the defendant.

There is evidence here of a conversation between the Chief of Police of Brinkley and the defendant, which you will recall. If you find from the evidence in this case that in fact the defendant made a confession and that it was induced by the statements made to him by the Chief of Police, and that said statements would not have been made except for said statements of the Chief of Police, or if you find that such confession if made might be fairly traceable to the hope inspired by the statements of said official, then you must wholly disregard said statements and confession, even though you might believe them to be true, because the law will not permit a jury to consider a confession so given or obtained.

There is also evidence in this case on the part of the defendant to the effect that he was

beaten and mistreated in order to obtain a confession from him, and evidence on the other hand on the part of the Government, to the effect that he was in no way mistreated. If you find from the evidence that the alleged confession was brought about by threats, coercion or physical force, then likewise you must ignore said alleged confession completely, even though you might believe that the statements therein contained are true.

On the other hand, if you find from the evidence in the case that said alleged confession was made and that it was voluntarily made on the part of the defendant, and was free from the taint of inducement proceeding either from hope inspired by assurances made to the defendant, or fear of what might befall him if the confession was not made, and also that no threats, coercion, undue influence or physical force was used to procure the confession, then you may consider said confession and give it just what weight, if any, should be accorded to it.

The Government, having offered the confession, must prove that it was made, but the burden of proving that a particular statement or admission was obtained by improper inducement, in general, is upon the defendant.

You are further instructed that unless you find from the evidence in this case that the alleged confession of the defendant was lawfully obtained, as I have instructed you, and should be received in evidence by you, then it will be your duty to acquit the defendant on all counts of the indictment, because without the alleged confession there is not sufficient

evidence in this case of the defendant's guilt to justify a verdict of guilty on any count.

The jury returned a verdict of guilty on each count (R. 397), and petitioner was sentenced generally to imprisonment for four years and 10 months (R. 20). On appeal, the Court of Appeals affirmed the judgment of conviction (R. 414).

ARGUMENT

Petitioner's sole contention is that his confession should not have been submitted to the jury on the dual grounds that it was not freely and voluntarily given and that it was inadmissible under the rule of *McNabb* v. *United States,* 318 U. S. 332.

(a) Petitioner asserts that his confession was induced by "brutal treatment" (Br. 2) and "severe pressure" (*id.* 4) exerted upon him by the Brinkley police and by their promises that if he confessed he would not have to serve the sentence on the vagrancy and trespassing charge and further that he would be tried in the state court rather than the federal court (Pet. 1-2).

The conflicting evidence at the preliminary hearing and the trial as to petitioner's treatment prior to his confession is summarized in the Statement, *supra.* The trial judge and the jury, under unexceptionable instructions, found that the oral confession made to Chief of Police Henderson on the evening of February 26, 1947, the day after petitioner's conviction and sentence in the city court and while he was lawfully held in custody under that sentence, and his written confession to the F.B.I. agents on the afternoon of February 27,

1947, were freely and voluntarily given without any promise or coercion of any kind. We submit that these concurrent findings of the judge and jury who heard the conflicting testimony are amply supported by the evidence.

Every one of the Government witnesses testified consistently and unequivocally that petitioner's confession was voluntary and absolutely free from any force and intimidation whatsoever. While he was questioned intermittently on February 25, the date of his arrest, and on February 26, after his conviction in the city court, he denied any connection with the thefts. His initial confession did not result from questioning, but was volunteered to Chief of Police Henderson when he visited the city jail on the evening of February 26 on another matter. Moreover, the local and federal officers, as well as other witnesses who observed petitioner on or about February 27 and the Monroe County sheriff who saw the doctor examine petitioner testified to the normal appearance of his clothing and person. These statements are supported by the photographs (Gov. Ex. 3, R. 107-108).

On the other hand, the evidence adduced by petitioner consists of the testimony of four prisoners, petitioner's wife and two relatives. The only consistency in their testimony is that they all testified that petitioner appeared bloody and badly bruised. In many respects their testimony is conflicting and weak. Two witnesses testified that the front of petitioner's head was bruised; three others, that

the back of his head was bruised. One witness testified that petitioner's shirt was bloody; petitioner's wife testified that petitioner's shirt was torn, but not bloody. The witness who testified that he saw the alleged beatings, admits that he saw them only through a crack in a door. Another witness, the prisoner who cooked at the Brinkley city jail, testified that he spent a week in jail with petitioner and that he was instructed not to give any food or water to him. In rebuttal, the Government adduced evidence to prove that this witness could not have been in jail with petitioner for much more than one day, and the person in charge of the Brinkley prison cooks testified that he gave no such instructions. Even petitioner's testimony relating to his conversation with his wife about retaining a lawyer for him was directly contradicted by her testimony. The foregoing inconsistent testimony adduced by petitioner and directly contradicted by consistent and unequivocal testimony of the Government witnesses, plus the undisputed facts that neither petitioner nor his wife made any complaints about mistreatment until several days after petitioner's transfer to the county jail and after he consulted an attorney, provide meager support for his contention that he was physically abused by the Brinkley police. In fact, it indicates that his contention that his confession was involuntary was merely an afterthought.

Petitioner's assertion that the confession was induced by Chief of Police Henderson's alleged promise that if he confessed he would not have to serve the local sentence and would be tried in a state instead of a federal court is equally unsupported by the record. Henderson's statement to petitioner that he "didn't imagine" petitioner would have to serve the local sentence if he confessed was not a promise but at most a vague expression of an opinion in answer to a specific question raised voluntarily by petitioner. Even if it could be interpreted as a promise, petitioner categorically denied at the pre-trial hearing that it had any influence on his decision to confess (*supra,* p. 13). Moreover, Henderson's uncontradicted testimony shows that in answer to petitioner's statement that he would like to be tried in a state court, Henderson said "I can't promise you that" (*supra,* p. 10).

(b) Petitioner's contention that the confession was inadmissible under the *McNabb* rule is wholly without merit. That decision (see also *Upshaw* v. *United States,* 335 U. S. 410) has no application here, for petitioner was not illegally detained at the time he made his oral confession on February 26, and his written confession on February 27, 1947, or any time thereafter, but was in the *lawful* custody of the Brinkley police, serving a sentence imposed on him by the city court on February 25. Nor, as shown above, was the confession elicited

by or in response to interrogation by either federal or state officers. The record does not show when after the filing of the complaint on March 1, 1947, petitioner was arrested on the federal charges, how much time elapsed between the arrest and arraignment on or about March 10, 1947, nor when he was placed in federal custody. But under *United States* v. *Mitchell*, 322 U. S. 65, such details are immaterial in any event, because there was no causative relation between the confession and any delay there may have been in arraigning him on the federal charges.

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.
JAMES M. MCINERNEY,
Assistant Attorney General.
ROBERT S. ERDAHL,
FELICIA H. DUBROVSKY,
Attorneys.

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